

Fluor Daniel, Inc. and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO. Case 26-CA-13842

September 28, 2007

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUUMBER, AND KIRSANOW

On May 28, 1993, the National Labor Relations Board issued a Decision and Order in this case, adopting Administrative Law Judge Martin J. Linsky's conclusion that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act by effectively discharging employee David Scott Bolen for refusing to cross a picket line, and by discriminatorily refusing to hire 53 voluntary union organizers (salts), including brothers Steven and John Coons. *Fluor Daniel, Inc.*, 311 NLRB 498 (1993). The Board petitioned the United States Court of Appeals for the Sixth Circuit to enforce the Board's Order.

On November 16, 1998, the court issued its decision enforcing the Board's Order in part and remanding to the Board. *NLRB v. Fluor Daniel, Inc.*, 161 F.3d 953 (6th Cir. 1998). The court enforced the Board's finding of 8(a)(1) and (3) violations for the Respondent's discharge of Bolen and its failure to hire the Coons brothers. With respect to the remaining salt applicants, the court remanded the case to the Board to address whether the General Counsel sufficiently matched each salt with a vacant position for which the salt was qualified. *Id.* at 971. On remand, Judge Linsky conducted the job-matching required by the Sixth Circuit and issued a supplemental decision. *Fluor Daniel, Inc.*, JD-66-01 (2001). Exceptions to Judge Linsky's supplemental decision have been resolved in a separate decision. *Fluor Daniel, Inc.*, 350 NLRB 702 (2007).

On June 7, 2004, Administrative Law Judge Jane Vandeventer issued the attached supplemental decision resolving compliance issues concerning Bolen and the Coons brothers. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, the Charging Party filed cross-exceptions and a supporting brief, and the Respondent filed a reply to the General Counsel's answering brief and an answer to the Charging Party's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the judge's supplemental decision and the record in light of the exceptions and briefs and has decided, for the reasons set forth below, to

affirm the judge's rulings, findings,¹ and conclusions and to sever the portion of this case involving the Coons brothers and remand it for further consideration in light of the Board's recent decision in *Oil Capitol Sheet Metal*, 349 NLRB 1348 (2007).²

I. DAVID SCOTT BOLEN

The Respondent excepts to the judge's calculation of Bolen's backpay on several grounds.

1. The Respondent excepts to the judge's application of *Dean General Contractors*, 285 NLRB 573 (1987), under which it is presumed that a construction-industry discriminatee would have continued to be employed by the respondent employer throughout the backpay period unless the employer demonstrates otherwise. Specifically, the Respondent argues that it rebutted the *Dean General* presumption by showing that at the end of each work project it terminates employees rather than transferring them to new projects. The Respondent also argues that the backpay period should not extend beyond the particular work project at issue because Bolen did not apply for new positions after the project ended. Moreover, according to the Respondent, Bolen was employed in a millwright position, the Respondent did not continue to employ millwrights after Bolen was discharged, and the jobs claimed for Bolen in the General Counsel's compliance specification are jobs that already were claimed for the union salts in the "job-matching" that Judge Linsky conducted on remand in JD-66-01, *supra*.

There is no dispute that, rather than transferring employees from one jobsite to another at the end of a project, the Respondent terminates them from the first jobsite and requires them to reapply at the next jobsite. However, there also is no dispute that the Respondent has a preference for hiring former employees on subsequent jobs. Absent his unlawful discharge, Bolen, as an existing employee, would have been the beneficiary of this hiring preference. In addition, the General Counsel showed that Bolen worked continuously throughout the backpay period, and that the Respondent had jobs available throughout that period for which Bolen was qualified. In these circumstances, even assuming no *Dean General* presumption that Bolen would have continued to

¹ We adopt the judge's finding, for the reasons discussed by her, that the Respondent failed to prove that it mailed Bolen a letter offering him a job. Thus, we find it unnecessary to pass on the judge's further finding that the letter did not include a valid offer of reinstatement.

² With respect to the Respondent's claim that "the entire ALJ decision" is defective because the judge "unnecessarily" delayed issuing her decision until 15 months after the close of the hearing, there is no basis on which to find that the judge delayed issuing her decision, as opposed to turning to the case in due course as her other judicial duties permitted, deliberating over the complex remedial issues raised in this case, and preparing a carefully reasoned decision.

work for the Respondent beyond the project from which he was discharged, we find that the General Counsel has demonstrated that Bolen would have been employed by the Respondent throughout the backpay period.³

With regard to the Respondent's claim that Bolen had an obligation to apply for later positions, the Board has held that, where, as here, an employer unlawfully discharges an employee, the employer has the duty to offer that individual reinstatement; the burden is not on the employee to reapply. See *McGuire Plumbing & Heating*, 341 NLRB 204, 206 (2004). Although the Respondent's practice of terminating employees at the conclusion of a job and requiring them to apply anew at subsequent projects would have required Bolen, once reinstated, to apply for other projects, there is no basis in the record for finding that Bolen's applications would have been rejected on those projects, particularly given the Respondent's preference for hiring former employees. Further, the Respondent's practice on some jobs was to actively solicit former employees to reapply, and there is no evidence that the Respondent ever solicited Bolen to apply for jobs after his discharge. For these reasons, we reject the Respondent's argument regarding Bolen's failure to reapply.

Finally, the Respondent contends that it had no millwright positions available and that the jobs claimed for Bolen in the compliance specification were claimed for the union salts in Judge Linsky's "job-matching" analysis and hence unavailable. Even if true, these contentions fail to extinguish Respondent's backpay liability to Bolen. The Board's original Order in this case directed the Respondent to reinstate Bolen to his former position *or*, if that job were no longer available, to a substantially equivalent position. Thus, to toll Bolen's backpay, the Respondent would have to show that it had *no* positions substantially equivalent to Bolen's former position.⁴ The mere fact that specific positions the General Counsel relied on to calculate Bolen's gross backpay were unavailable obviously does not prove that *no* substantially equivalent positions were available. And the Respondent did not provide any evidence that it has no available substantially equivalent positions for which Bolen is qualified. To the contrary, we have found above that Respondent did have such positions. Accordingly, we reject the Respondent's arguments on this point.

³ Accordingly, we find it unnecessary to pass on the judge's findings that relitigation of the *Dean General* issue was foreclosed, and that the *Dean General* presumption required the Respondent to demonstrate that Bolen lacked the skills necessary to perform any jobs in existence at any of the Respondent's jobsites.

⁴ See, e.g., *Essex Valley Visiting Nurses Assn.*, 343 NLRB 817, 821 (2004); *Eddyleon Chocolate Co.*, 301 NLRB 887, 892 (1991).

2. The Respondent argues that the judge erred by allowing the General Counsel to exclude lower-level "helper" positions in calculating gross backpay. According to the Respondent, this is inconsistent with Judge Linsky's finding in JD-66-01, *supra*, that journeymen would be willing to accept helper positions.

There is record evidence that some journeymen would be willing to accept lower graded positions. However, the compliance officer testified that he did not include helper positions in calculating Bolen's gross backpay because Bolen, a skilled journeyman, had stated that he would not accept such a position. Thus, the judge properly allowed the General Counsel to exclude helper positions from his gross backpay calculations.

3. The Respondent excepts to the judge's finding that it was appropriate for the General Counsel, in selecting the employees to whom Bolen would be compared for purposes of calculating gross backpay, to include only the Respondent's employees who were in the top 10 percent of employees in terms of number of hours worked in each individual year of the backpay period. The Respondent also argues that the judge erred by failing to consider that there was attrition in the top 10-percent group from year to year. For support, the Respondent cites *Painters Local 277 (Polis Wallcovering)*, 282 NLRB 402 (1986), *enfd. mem.* 860 F.2d 1075 (3d Cir. 1988).

The Board's objective in compliance proceedings is to restore, to the extent feasible, the status quo ante by restoring the circumstances that would have existed had there been no unfair labor practices. *Parts Depot, Inc.*, 348 NLRB 152, 153 (2006). Because determining what would have happened absent the unfair labor practice is often problematical, the General Counsel is allowed wide discretion in choosing a formula for computing backpay. *Id.* The General Counsel's burden is to establish gross backpay amounts that are reasonable, not arbitrary. *Id.*

The compliance officer testified that he used the top 10-percent group because he wanted to select a "core group" of Respondent's employees who were "consistently employed" throughout each quarter of the backpay period, as was Bolen. Further, as noted previously, the General Counsel demonstrated that, throughout the backpay period, the Respondent had jobs available for which Bolen would have been qualified. Accordingly, *Polis Wallcovering*, *supra*, where demand for employees in the relevant position "fluctuated greatly during the backpay years," 282 NLRB at 403, is distinguishable from this case and does not support a finding that the judge erred by adopting the General Counsel's use of the top 10-percent group.

With regard to the Respondent's claim regarding attrition, the Board has held that the mere fact that other employees stopped working for an employer at various times during a backpay period does not demonstrate that discriminatees likewise would have stopped working for the employer during those same times. See *McGuire Plumbing & Heating*, supra at 204 fn. 1. The Respondent has provided no evidence regarding the circumstances of the individuals in the top-10-percent group, and thus has not shown that the employees who left the Respondent's employ are comparable to Bolen.⁵

For the foregoing reasons, we reject the Respondent's claim that the judge erred by adopting the General Counsel's use of the top 10-percent group and by declining to rely on evidence of attrition.

4. The Respondent argues that, in adopting the General Counsel's gross backpay calculations for Bolen, the judge erred by failing to take into account that construction employees tend to work more hours in some seasons than they do in others. In making this argument, however, the Respondent relies on calculations unrelated to Bolen.

At the compliance hearing, the Respondent's statistical expert testified that the Coons brothers' interim earnings demonstrated that they had worked more hours in the second and fourth quarters of the year than they had in the first and the third quarters. The Respondent's expert witness then computed "indexes of seasonal variations" that he applied to the Coons brothers' gross backpay figures to redistribute the total amount of their gross backpay into different individual quarters. The witness stated that he "didn't have any seasonal data" for Bolen, so he merely "took the average of the seasonal indexes that had been computed for" the Coons brothers. He acknowledged that, as he lacked information regarding Bolen's interim earnings, "they may not even have been seasonal." He also said that he was "certainly not going to argue" that this was the best method for calculating an alleged seasonal variation for Bolen's backpay.

In essence, in seeking to support a "seasonal" calculation of Bolen's backpay, the Respondent's statistical expert based his calculations on figures having nothing to do with Bolen. Further, there was evidence indicating that Bolen would not have worked on a seasonal basis. In this regard, the compliance officer testified that maintenance work is seasonal but construction work is not necessarily seasonal, and that the positions he relied on to compute Bolen's gross backpay were positions that involve both maintenance *and* construction work. In

these circumstances, we find that the Respondent has not demonstrated that the judge erred in rejecting its seasonal variations argument.⁶

5. The Respondent argues that the judge erred by beginning Bolen's backpay period on May 3, 1990, because Bolen had indicated that he would not cross a picket line, and there were picket lines on the work project until sometime after May 3.

Where a compliance specification sets forth the beginning date of the backpay period, if the respondent disputes the accuracy of that date, then the respondent has the burden to set forth in its answer an alternative date for beginning the backpay period. See *Emsing's Supermarket*, 299 NLRB 569, 570 (1990). Even where the respondent's answer sufficiently disputes the backpay period set forth in the compliance specification, the respondent has the burden in the compliance hearing to "establish facts that would warrant altering" that alleged period. *Id.* at 571 fn. 7.

In his original merits decision, Judge Linsky found that Bolen was "effectively discharged" on May 3, 311 NLRB at 502, and neither the Board nor the court disturbed this finding on review. Judge Linsky also stated that the picket line that Bolen was refusing to cross "eventually came down," *id.*, but he did not specify the date that happened, and the court specifically noted that "[t]he record does not reflect when the picketing activity ended." *NLRB v. Fluor Daniel, Inc.*, 161 F.3d at 973.

Consistent with Bolen's "effective discharge" date, the compliance specification set forth Bolen's backpay period as beginning on May 3. In its answer, the Respondent stated that the spring outages ended in "early June" and that "picketing continued until the end of the spring outages, or at least until after all of the hiring was completed on those outages." But the Respondent did not set forth a specific date, nor does it provide any convincing evidence resolving that issue.⁷

⁶ Again, the judge precluded the Respondent from arguing seasonal variation. Having rejected the argument on its merits, we find it unnecessary to pass on this aspect of the judge's decision.

⁷ The Respondent claims that certain job applications that were allegedly filled out on the picket line include dates as late as May 15, indicating that the picket line lasted at least until that date. But during the hearing on the merits, Boilermaker Organizer Barry Edwards testified that the applications that were filled out on the picket line were filled out on May 3. Shown the applications that the Respondent now cites, most of which were dated after May 3, Edwards testified: "Looking at these applications, evidently [the Boilermakers' business agent] got other applications filled out and waited a while before he mailed any of them in. I don't know." Thus, the applications cited by the Respondent are not necessarily the same applications that were filled out on the picket line, and they are not convincing evidence that the picket line lasted until May 15.

⁵ The judge found that the Respondent was precluded from making its attrition-based argument. Having rejected the argument on its merits, we find it unnecessary to pass on the judge's finding in this regard.

In these circumstances, we find that the Respondent has not met its burden of establishing facts that would warrant altering the starting date of the backpay period alleged in the compliance specification. Accordingly, we adopt the judge's finding that the backpay period for Bolen began on May 3.⁸

II. JOHN AND STEVEN COONS

Unlike Bolen, John and Steven Coons were not discharged employees; they were union salts who applied for employment with the Respondent and were discriminatorily refused hire.

On May 31, 2007, the Board issued its decision in *Oil Capitol Sheet Metal*, supra. *Oil Capitol* requires the General Counsel, as part of his existing burden of proving a reasonable gross backpay amount due, to present affirmative evidence that a union salt who was discriminated against, if hired, would have worked for the employer for the backpay period claimed in the General Counsel's compliance specification. The Board has decided to remand the portion of this case involving the Coons brothers for further consideration in light of *Oil Capitol*,⁹ including allowing the parties to file briefs on

⁸ Member Schaumber finds that the record does not support beginning the backpay period for Bolen on May 3. He agrees with the Respondent that backpay should begin at a later date. The picketing began on April 29, and Bolen indicated on the same day that he would not return to work until the picketing ended. *Fluor Daniel, Inc.*, supra, 311 NLRB at 502. Although the record does not clearly reflect when the picketing ended, the Sixth Circuit assumed that "picketing activity continued through the entirety of the remaining spring outages," amounting to "at most . . . about two months." *NLRB v. Fluor Daniel, Inc.*, supra, 161 F.3d at 973. A 2-month estimate is consistent with the date that the last spring outage ended: June 30 as listed by Judge Linsky. *Fluor Daniel Inc.*, 311 NLRB at 501. Even if we were to conclude that picketing ended at the Green II plant in Sebree (the location where Bolen had returned to work and subsequently refused to cross a picket line) on the last date of the spring outage at that particular plant, the earliest possible date that Bolen might have returned to work would have been May 20, the day after the spring outage ended at the Green II plant. *Id.*

⁹ Member Liebman would find that the law of the case requires the application of *Dean General Contractors*, 285 NLRB 573 (1987). In the underlying proceeding, the Board adopted the judge's finding that a reinstatement and backpay remedy was governed by *Dean General* as to all the aggrieved discriminatees, including John Coons, Steven Coons, and David Scott Bolen. 311 NLRB at 506–507. The court of appeals granted the Board's petition to enforce its order as to these three individuals. Because the court of appeals expressly enforced the Board's Order and remedy as to these three discriminatees, the Board must apply *Dean General* as the law of the case.

The majority, however, remands the issue of the calculation of backpay as to John Coons and Steven Coons for yet another compliance determination under the principles of *Oil Capitol Sheet Metal*, 349 NLRB 1348 (2007), a recent decision overruling the application of *Dean General* to union salts. The majority says that "remedial specifics" are reserved for compliance. But *Dean General* does not compel a specific backpay formula or calculation. In the underlying unfair labor practice proceeding, the Board commonly sets forth governing remedial

the issue, and, if warranted, reopening the record to present evidence relevant to deciding the case under the *Oil Capitol* framework.¹⁰

More specifically, the issue to be addressed on remand is the duration of the backpay period for purposes of calculating gross backpay. *Oil Capitol* also may bear on an employer's continuing duty to offer instatement: "[i]f the General Counsel fails to prove by affirmative evidence the reasonableness of a claim that the backpay period should run indefinitely, then the salt/discriminatee is not entitled to instatement." *Oil Capitol*, 349 NLRB 1348, 1349. This latter aspect of *Oil Capitol*, however, may not be addressed on remand. The Board's Order in the underlying "merits" decision specifically requires the Respondent to "offer to the below listed individuals em-

principles that are to be applied in a reasonable fashion at compliance. That is what happened here in the underlying Board proceeding—and the Board's Order to that effect was enforced. Thus, *Dean General* is the law of the case. See *Iron Workers, Local 378*, 262 NLRB 421 (1982) (backpay interest rate that has been enforced by the court of appeals is the law of the case in later compliance proceeding, even when the Board has postenforcement adopted a new interest rate).

The majority finds that the Board's Order purportedly "leaves unspecified" and does not incorporate by reference the principles to be applied as to backpay, i.e., the application of *Dean General* principles here. Although it is advisable that the Board's Order incorporate specifically, or by reference, the make-whole remedy section of the Board's decision, the Board occasionally neglects to do so, as it did here. See, e.g., *Crittenton Hospital*, 343 NLRB 717, 721 (2004) (no specific reference in the Order to a backpay formula or specific incorporation by reference to the formula set forth in the remedy section); *Northwest Graphics, Inc.*, 342 NLRB 1288, 1290 (2004) (same); *Kamtech, Inc.*, 339 NLRB 97, 101 (2003) (same). The absence of a specific reference in the Order to the remedy section, however, does not extinguish the backpay principles to be applied because the remedy is encompassed in the Order by necessary inference. Indeed, the "law of the case" doctrine precludes reconsideration of matters that were decided "either explicitly or by necessary inference" in the underlying proceeding. See *Hanover Insurance Co. v. American Engineering Co.*, 105 F.3d 306, 312 (6th Cir. 1997) (emphasis supplied). Here, it is evident that the Board adopted the judge's *Dean General* remedy and the court of appeals affirmed the Board's disposition as to the Coons brothers in its entirety. Notwithstanding the inadvertent absence of an "incorporation by reference" phrase in the Board's Order, there can be no real doubt that the court enforced the Board's Order and the remedy in full as to the Coons brothers and that this included the *Dean General* rubric. Finally, the majority claims that, in citing *Dean General*, the judge and the Board "did not invoke a remedial principle to be applied at compliance." The majority is wrong. When the judge and the Board applied *Dean General* here, they intended it to apply to compliance issues, just as the majority now intends to apply *Oil Capitol* to compliance issues by virtue of its remand.

¹⁰ We find it premature at this time to address the remaining exceptions regarding the calculation of gross backpay for the Coons brothers. The Charging Party requests that we resolve its cross-exceptions only if we find merit in the Respondent's exceptions. As we have found no merit to the Respondent's exceptions—we have rejected some of them and found it premature to address the rest of them at this time—we also find it unnecessary to resolve the Charging Party's cross-exceptions at this time.

ployment in the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions.” *Fluor Daniel*, 311 NLRB at 507. The “below listed individuals” include, inter alia, John and Steven Coons. The court enforced the Board’s Order with respect to John and Steven Coons. Accordingly, notwithstanding the Board’s intervening decision in *Oil Capitol*, we lack jurisdiction to further consider the Respondent’s duty to offer employment to the Coons brothers. See *Scepter Ingot Castings, Inc.*, 341 NLRB 997, 997 (2004) (“Under Section 10(e) of the Act, [the Board has] no jurisdiction to modify an Order that has been enforced by a court of appeals.”), *enfd.* 448 F.3d 388 (D.C. Cir. 2006).

Contrary to our dissenting colleague, the Board is not similarly foreclosed from revisiting the duration of the brothers’ backpay periods. A court of appeals enforces only the Board’s Order, and nothing in the underlying court-enforced order would be modified if, on remand, the duration of the backpay period were altered. The relevant provision of that Order, paragraph 2(b), requires the Respondent to

Make the individuals listed in paragraph 2(a) and above whole for any loss of pay and other benefits suffered by them. Backpay is to be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) (see generally *Isis Plumbing Co.*, 138 NLRB 716 (1962)).

311 NLRB at 507. This provision leaves unspecified the principles to be applied in determining the duration of the backpay period. Neither does the Order incorporate by reference such principles stated elsewhere. As our colleague notes, the Board typically sets forth, in the remedy section of its decisions, “governing remedial principles that are to be applied in a reasonable fashion at compliance”; and those principles are then typically incorporated by reference in the order. But that procedure was not followed here. The judge cited *Dean General* in the remedy section of his decision, but neither paragraph 2(b) nor any other provision of the Order incorporates that section by reference.¹¹

¹¹ Moreover, in citing *Dean General*, the judge did not invoke a remedial principle to be applied at compliance. He did not say, for example, that at compliance the *Dean General* presumption would apply, subject to rebuttal by the Respondent. Rather, he himself applied *Dean General* and found that the discriminatees’ “right . . . to reinstatement and backpay should extend beyond the termination of Respondent’s contract with Big Rivers in the fall of 1990.” 311 NLRB at 506. Thus, it is unsurprising that the Order did not incorporate the remedy section by reference, as that section failed to state any remedial principles to be subsequently applied.

We disagree with our dissenting colleague’s statement that the remedy section was encompassed in the Order by “necessary inference”

Iron Workers Local 378 (Judson Steel Corp.), 262 NLRB 421 (1982), upon which our colleague relies, is not to the contrary. There, the underlying court enforced order required the respondent to make whole a named individual “by paying him a sum of money computed in the manner set forth in the remedy section of this Decision.” *Bridge Workers, Local 378 (Judson Steel Corp.)*, 192 NLRB 1069, 1076 (1971). The remedy section of that decision, in turn, provided that interest on the backpay award must be computed at 6 percent. *Id.* Thus, in a supplemental decision, the Board properly rejected the judge’s recommendation that interest be otherwise computed. Although it did not explain why it was doing so, the Board clearly lacked jurisdiction to adopt the judge’s recommendation because to do so would have modified the court-enforced order. Here, by contrast, no modification of the Order will ensue from our remand.

ORDER

The National Labor Relations Board orders that the Respondent, Fluor Daniel, Inc., Greenville, South Carolina, its officers, agents, successors, and assigns, shall make whole the individual named below, by paying him the amount following his name, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws:

David Scott Bolen	\$ 18,442.05
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IT IS FURTHER ORDERED that the portion of this proceeding concerning Steven and John Coons is remanded for further appropriate action as set forth above.¹²

IT IS FURTHER ORDERED that the administrative law judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the supplemental decision shall be served on all parties, after which the provisions of Sec-

and, thus, that the application of *Dean General* is the law of the case. In the very decision cited by the dissent, the court stated that the law of the case doctrine “is limited to those questions necessarily decided in” the earlier proceeding. *Hanover Insurance Co. v. American Engineering Co.*, 105 F.3d 306, 312 (6th Cir. 1997). As the duration of the backpay period is an issue that is generally reserved for compliance, the judge’s application of *Dean General* was not “necessary” to his decision, the Board’s, or the court’s. Further, neither the Board nor the court of appeals commented on this portion of the judge’s decision or discussed how the backpay period should be calculated, underlining that *Dean General* was not necessary to their respective decisions. Accordingly, we disagree with the dissent’s statement that “there can be no real doubt” that the court enforced the remedy portion of the judge’s decision, including his application of *Dean General*.

¹² Inasmuch as Judge Vandeventer is retired, we shall remand this proceeding to the chief administrative law judge for assignment.

tion 102.46 of the Board's Rules and Regulations shall be applicable.

Susan Greenberg, Esq., for the General Counsel.

Melvin Hutson, for the Respondent.

Michael Stapp, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JANE VANDEVENTER, Administrative Law Judge. This case was tried on March 10 and 11, 2003, in Memphis, Tennessee. This is a supplemental compliance proceeding for the purpose of determining the remedy due three employees found by the Board to have been unlawfully discharged or denied employment by Respondent in the Board's Decision and Order, found at 311 NLRB 498 (1993). This proceeding deals with only a part of the Board's Decision and Order, that involving David Scott Bolen, John H. Coons, and Steven S. Coons. On review by the United States Court of Appeals for the Sixth Circuit, the Court enforced the Board's Decision and Order as it related to the three individuals named above, and remanded the remaining portion of the case to the Board for consideration of the issue of job availability as to the approximately 51 other discriminatees. *NLRB v. Fluor Daniel, Inc.*, 161 F.3d 953 (6th Cir. 1998).¹

The compliance specification herein issued on June 6, 2002, and an amended compliance specification issued on October 25, 2002. Respondent filed an answer to the amended compliance specification taking issue with certain of the allegations therein, which issues will be set forth in detail below.

After the conclusion of the compliance hearing, the parties filed briefs, which I have read.

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying, the documentary evidence, and the entire record, I make the following

FINDINGS OF FACT

I. BACKGROUND

A. The Decisions of the Board and the Sixth Circuit

With respect to the three discriminatees at issue here, the Board and the Court found that Respondent had discharged David Scott Bolen (Bolen) in violation of Section 8(a)(3) of the Act, and had refused to hire John H. Coons (J. Coons) and Stephen S. Coons (S. Coons) in violation of Section 8(a)(3) of the Act. The Board ordered Bolen reinstated to his former position and J. Coons and S. Coons offered employment in the positions for which they applied, all without prejudice to their seniority and other rights and privileges. The Board further ordered Respondent to pay backpay to the three named individuals.

B. Respondent's Business

Respondent, a national general contractor, performed work for Big Rivers Electrical Corporation (BR) in 1990 at several jobsites in Kentucky. The work consisted of maintenance and

repair work on electrical power generating stations while the stations were shut down. According to the record in the unfair labor practice proceeding, the work was expected to last into 1991 and 1992, but in fact ended in 1990. Respondent performed work at hundreds of other jobsites throughout the country during the period from 1990 through the time of the compliance trial.

C. The Three Discriminatees

The Board found that employee Bolen was unlawfully discharged from his employment by Respondent on May 3, 1990, and ordered him reinstated with appropriate backpay. During his employment with Respondent, Bolen performed work such as welding, ironwork, and millwright work. In his interim employment since that time, Bolen has performed, in addition, maintenance and mechanic work.

The General Counsel has calculated gross backpay for Bolen from May 3, 1990, through the third quarter of 2002, and contends that backpay eligibility continues until Respondent makes a reinstatement offer to him which meets the Board's standards. For all quarters except two in the more than 12-year backpay period calculated thus far, Bolen was steadily employed and had interim earnings. His interim earnings exceeded his gross backpay for over 10 years of that period. According to the pleadings, concerning the quarters up to and including the third quarter of 2002, net backpay is claimed for Bolen for only seven quarters, or less than 2 years altogether, during 1990 and 1991, for a total of \$18,442.05, plus interest.

The Board found that employees J. Coons and S. Coons were unlawfully denied employment by Respondent on April 9, 1990, and ordered them to be offered employment in the positions for which they applied with appropriate backpay. J. Coons was and is a journeyman boilermaker who completed his apprenticeship in 1979. S. Coons was and is a journeyman boilermaker who completed his apprenticeship in 1980.

The General Counsel has calculated gross backpay for J. Coons from April 9, 1990, through the third quarter of 2002, and contends that backpay eligibility continues until Respondent makes an instatement offer to him which meets the Board's standards. For all quarters in the more than 12-year backpay period calculated thus far, J. Coons was employed and had interim earnings. His interim earnings exceeded his gross backpay for over 9 years of that period. According to the pleadings, concerning the quarters up to and including the third quarter of 2002, net backpay is claimed for J. Coons for only 12 quarters, or 3 years altogether, for a total of \$32,566.54, plus interest.

The General Counsel has calculated gross backpay for S. Coons from April 9, 1990, through the third quarter of 2002, and contends that backpay eligibility continues until Respondent makes an instatement offer to him which meets the Board's standards. For all quarters in the more than 12-year backpay period calculated thus far, S. Coons was employed and had interim earnings. His interim earnings exceeded his gross backpay for nearly 7 years of that period. According to the pleadings, concerning the quarters up to and including the third

¹ The remanded portion of the case has been heard and decided by an administrative law judge. See *Fluor Daniel, Inc.*, JD-66-01 (2001).

quarter of 2002, net backpay is claimed for S. Coons for only 15 quarters, for a total of \$43,579.84, plus interest.

II. BACKPAY ISSUES

A. General Counsel's Burden of Proof

The General Counsel bears the burden of proving gross backpay. This means that the General Counsel must show that he made a reasonable approximation of the gross backpay, which would have been earned by the discriminatees but for the discrimination against them. This entails showing the appropriate time period for backpay as well as a reasonable and appropriate method for calculating backpay. The Board has a well-established policy to the effect that a backpay formula which "approximates what discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances." *La Favorita, Inc.*, 313 NLRB 902 (1994). When any uncertainty exists in the evidence, it should be resolved against the respondent who was the wrongdoer. See *Ryder/P*I*E/Nationwide*, 297 NLRB 454, 457 (1989), *enfd.* in relevant part 923 F.2d 506 (7th Cir. 1991).

1. Backpay period issues

a. *Dean General Contractors* issue

The Board, in *Dean General Contractors*, 285 NLRB 573 (1987), held that with regard to remedies dealing with employers in the construction industry, the Board would adhere to its standard presumption of continuing employment, and assign the burden of countering that presumption to the employer seeking to end backpay based on specific facts unique to its own situation. The case was an unfair labor practice proceeding, and so the Board, after modifying the order of the administrative law judge, left to the compliance stage the issue of whether the employer in that case had a "permanent and stable" work force and would therefore have retained the discriminatee in its employment, or whether it would have terminated him and all other employees upon the termination of the particular project in question. The Board held that the issue had not been fully litigated at the unfair labor practice hearing. While the Board noted that "ordinarily" the issue of continuing employment of a discriminatee would be handled at a compliance proceeding, it nowhere foreclosed the consideration of such an issue during an unfair labor practice hearing where the issue was fully litigated. It is conceivable in many instances that this issue may be relevant to other issues in the unfair labor practice case, and thus to be fully explored at that time.

In the instant proceeding, the General Counsel and the Charging Party take the position that the issue of whether the discriminatees would have continued employment with Respondent was decided in the underlying unfair labor practice proceeding, and hence may not be relitigated in the instant proceeding. The Respondent takes the position that the issue was not so decided, and furthermore *Dean General Contractors* requires that it be handled *only* in the compliance stage.

In the unfair labor practice portion of this case, the remedy recommended to the Board by the administrative law judge

(ALJ) in his decision, and adopted by the Board included the following paragraph:

Obviously the Big Rivers project is over as far as Respondent is concerned since Big Rivers, rightly or wrongly, terminated its contract with Respondent because of Big Rivers' view that Respondent's job performance was poor. Respondent is a major employer, which undertakes projects throughout the United States. Bearing in mind that Respondent, after Big Rivers terminated its contract, went on to other projects in this part of the country and elsewhere and that employees in the construction industry move from jobsite to jobsite and further bearing in mind Respondent's practice of giving priority in hiring to employees who have worked for it in the past the right of the aggrieved 55 discriminatees (which includes Bolen) to reinstatement and backpay should extend beyond the termination of Respondent's contract with Big Rivers in the fall of 1990. See *Dean General Contractors*, 285 NLRB 573 (1987).

Despite Respondent's exception to this remedy, the Board adopted the remedy as its own, and the Court of Appeals left this aspect of the Board's remedy undisturbed.

It is uncontested that Respondent's hiring policies were the subject of extensive evidence during the unfair labor practice hearing. In connection with the exploration of whether there had been discrimination against the applicants in issue, Respondent's witness testified extensively as to its policy of favoring for hire employees who had worked for it at other jobs. There was evidence that Respondent would notify some former employees by mail or telephone of jobsites it wanted to staff, and maintained a toll-free telephone number for former employees to call to learn of jobsites where Respondent might employ them. In this proceeding, it was reconfirmed that Respondent had rehired a large number of employees on sequential projects for decades. The fact that Respondent's policy involved terminating and rehiring an employee rather than transferring the employee directly from one job to another is not determinative. It is a matter of form rather than substance.

As the administrative law judge noted in the passage quoted above, it was in partial reliance on Respondent's preferential rehire policy that he recommended the continuation of the right of the discriminatees to reinstatement and backpay beyond the termination of the BR job. As the Board adopted this remedy, and the court of appeals enforced the remedy without any change to this aspect of the Order, I find that the continuing nature of the backpay remedy has been decided in the unfair labor practice proceeding, and that Respondent is thus precluded from relitigating it at the compliance stage.

Even if a contrary finding were possible, and the issue were to be decided here in the compliance stage of the case, it is the Respondent's burden to show that it would NOT have continued to employ the discriminatees on the same basis it continued to employ others of its employees under its policy of preferential hire of individuals who had worked for it before. *Cobb Mechanical Contractors*, 333 NLRB 1168, 1175 (2001). This would necessitate that Respondent show specific reasons at all its jobsites that the discriminatees did not possess the skills

necessary to perform the jobs in existence there. Respondent produced no such evidence. It simply stated, relying upon evidence in the underlying proceeding, that it had employed very few of its BR jobsite employees at subsequent jobsites. Respondent adduced no evidence concerning specific lawful reasons why these discriminatees would not have been employed by it on other jobsites. Placed in the balance opposite the stipulated evidence of its policy of preferentially hiring former employees and the uncontroverted evidence in the backpay data that thousands of its employees continued to work for Respondent on a regular basis, the single fact that Respondent reemployed only some of its BR employees could not carry Respondent's significant burden of proving that it would not have continued to employ these discriminatees. Respondent's reasons for its policy of favoring employees who had previously worked for it were similar to those enunciated in *Cobb Mechanical Contractors*, above. The employees and their skills, abilities, and productive capabilities were known to Respondent. As in that case, too, Respondent's policy of preferring to rehire its former employees is a factor which favors a finding of continuing employment.

Respondent has provided an *argument* that it would not have employed the discriminatees at other jobsites, but it has not proven any facts which would establish a reason for failing to continue to employ any of the three discriminatees. *Cobb Mechanical Contractors*, above at 1175. I find that Respondent has not met its burden of proving the discriminatees would not have continued to be employed by it on other jobsites. In sum, I find that the backpay periods continue as alleged in the compliance specification.

b. Beginning date for Bolen

The Board found that Bolen was unlawfully discharged from his employment at Respondent for refusing to cross a picket line. The effective date of the discharge was May 3, 1990. The General Counsel began the backpay period for Bolen on the date of his discharge. Respondent claims that it had no obligation to reinstate Bolen until some later time that spring when the Union's picket line no longer existed at its jobsites, but produced no evidence of exactly when this occurred.

Respondent mistakes the proper remedy for discharged employees. Backpay for an effectively discharged striker is to be awarded from the date of his discharge rather than from the date of any offer of his to return to work, or the cessation of picketing. *Citizens Publishing Co.*, 331 NLRB 1622 fn. 2 (2000). Once a respondent has discharged a striker unlawfully, the discriminatee is in the position of any other unlawfully discharged employee, and it then becomes the *respondent's* obligation to reinstate the employee and to pay him backpay from the date of his discharge. Respondent appears to argue that its reinstatement obligation to Bolen was the equivalent of a recall obligation to a striker. This is completely incorrect, because the Board found that Bolen had been *discharged*. In accordance with Board law, I find that the General Counsel correctly determined that Bolen's backpay period began on

May 3, 1990.²

2. Gross backpay calculation formula

Where an unfair labor practice has been committed and a backpay remedy is due, the Board holds that there is a presumption that *some* backpay is owed. In a backpay proceeding, the burden is on the General Counsel to show gross amounts of backpay due. In meeting its burden, the General Counsel has discretion in selecting a formula which will closely approximate the amount due. The General Counsel need not find the exact amount due—indeed that would most likely be an impossibility. *Basin Frozen Foods, Inc.*, 320 NLRB 1072 (1996). Certainly it is the goal of a compliance proceeding to utilize as accurate a method as possible under the circumstances of the case, and considering the information available. Where a respondent advances a competing method of calculation, the Board must decide which method would yield the most accurate approximation of backpay. *Performance Friction Corp.*, 335 NLRB 1117 (2001).

a. Method of calculation

In general, the General Counsel may attempt to determine the amount which would have been earned based on past earnings, based on the earnings of a replacement employee, or based on the earnings of a comparable or "representative" employee or employees (comparable employees). In this case, the General Counsel has determined gross backpay for 1990 based on the replacement employee method, and for subsequent periods, based on the comparable employees' method. The compliance officer credibly testified that the earnings history method was impracticable in this case since two out of the three discriminatees had no earnings history with Respondent upon which to base an estimate of backpay, and the third employee had a relatively short earnings history. The replacement employee method was utilized for the remainder of calendar year 1990, based on the BR project, and to this method Respondent

² Respondent also claims with respect to Bolen that after his discharge, it employed no employees categorized as "millwright," which Bolen was categorized as, at the BR jobsite, and that it therefore had no job for him. The Board Order clearly states that if the discriminatee's job no longer exists, its obligation is to reinstate him to a "substantially equivalent position." As the Court of Appeals found that Bolen was entitled to reinstatement, its findings necessarily contained the implicit finding that Respondent had a job for him. The remainder of the case was remanded for just such a showing regarding other individuals. This issue was therefore decided in the underlying unfair labor practice case, and Respondent is foreclosed from reopening it. *McGuire-Plumbing & Heating*, 341 NLRB 204 fn. 1 (2004).

In any case, Respondent has not met its burden of showing that there was no job available which Bolen could have performed in 1990. Bolen was a skilled welder and mechanic. Respondent has not shown, and could not show, that it had no jobs, either at the BR site or at others of its many jobsites, which a person possessing Bolen's skills could perform. No evidence on this point was proffered except reference to a list of employees employed at the BR site for remainder of 1990 which contains no mention of millwrights. This bare document does not carry Respondent's considerable burden of showing that it had no work available for Bolen that he was qualified to perform in its extensive operations, or that all such jobs had been "abolished."

has no objection.³ Therefore, the gross backpay calculated for the three discriminatees for 1990 is found to be as set forth in the General Counsel's compliance specification and its pertinent amendments.⁴ Furthermore, as Respondent has admitted the interim earnings calculations and has not contested any issues associated with these interim earnings, the net backpay figures for 1990 as calculated by the General Counsel are found to be the appropriate net backpay for the three discriminatees for that period.

b. Selection of comparable employees—1991 and beyond

For subsequent quarters of the backpay period, the comparable employees' method was utilized. The data upon which the backpay calculations were based were provided by Respondent, but must be described. Respondent represented that the volume of data relating to its thousands of employees and hundreds of jobsites for a more than 12-year period would be unmanageable. The parties stipulated that the backpay calculations were appropriately based on hourly employment data for certain of Respondent's employees for 5 years of the backpay period: the calendar years 1996 through 2000.⁵ The parties agreed that the data from this period would be extrapolated to the entire backpay period.

The parties differed, however, as to the selection method of the comparable employees group. Because of the large number of employees included in the data, only 10 percent of the total number of employees were used as the comparable employee group. The General Counsel selected from among the Respondent's employees those who were highly skilled, and who worked at a journeyman level, like the discriminatees. The General Counsel also selected employees who worked consistently throughout the backpay period, again like the discriminatees.

Respondent contended that a larger group of employees should be used, including helpers. First, none of the discriminatees was a helper. Both the Coons were journeymen, and were unlawfully denied jobs by Respondent at that level. Bolen was actually working for Respondent at a journeyman level. The General Counsel quite rightly concluded that helpers were not comparable in skill or pay level to the discriminatees. When a group of comparable employees is used as a basis for

backpay calculations, they should be similar to the discriminatees, not employees in different job classifications or whose work histories are quite different from those of the discriminatees. See, e.g., *Performance Friction Corp.*, above. I reject Respondent's contention that helpers should be included in the comparable group of employees for the purposes of hours or of wages. Such a method would result in less accurate backpay figures.⁶

Respondent argued that, based on an industrywide study of construction industry employees issued by the Federal Mediation and Conciliation Service in 2000, the General Counsel should have utilized an average industrywide number of hours worked annually in the construction industry. The study concerned shortages of skilled workers in the construction industry, and utilized at one point an average of approximately 1800 hours annually as a representative number. The comparable Respondent employee group used by the General Counsel worked over 2000 hours per year, figures which included overtime. Under Board law, the objective of backpay calculations is to approximate backpay which would have been earned while working for a specific respondent by this specific discriminatee, not averages from many unrelated employers. Respondent's argument is contradictory to its contention at trial that the most accurate measure should be used. Certainly use of an industrywide average for all construction workers would be a far less accurate measure of backpay in this case than data drawn from a group of specific comparable employees who actually worked for this Respondent. I find that Respondent's argument that an industrywide average should be used to calculate annual hours for the backpay period to be entirely without merit and must be rejected as yielding an inaccurate result.

c. "Attrition" issue

Respondent argues that the comparable employee group should include employees who gradually ceased to work for Respondent. Respondent presented as a witness a statistician who had calculated the amount of hours which would have been worked by a typical group of employees who were subject to "attrition," in other words, worked less and less for Respondent as the years went by, due to various reasons such as death, injury, moving to other employers, etc. Respondent argued that the phenomenon of attrition is normal in any work force. Assigning a hypothetical attrition rate to the comparable employee group would have the effect of gradually reducing gross backpay over the years, especially in the latter portion of the backpay period. There is limited application of this argument to the facts herein, as the majority of the quarters when net backpay is due the discriminatees falls early in the backpay period.

The General Counsel and the Charging Party argue that this argument was not included in Respondent's pleadings, and thus Respondent is technically precluded from making the argu-

³ Respondent did not contest that backpay should be calculated through the end of 1990, the end of the BR project. With regard to 1990, Respondent contested backpay due Bolen on the basis set forth and rejected above.

⁴ Shortly before the compliance trial and during the trial, certain arithmetical calculations were modified based on correction of data discovered by both parties. The corrections of the arithmetical calculations were not objected to, Respondent having preserved its overall defenses to the calculations as set forth in the decision. For Bolen, the relevant corrected backpay amounts are set forth in GC Exh. 2. For J. Coons, the relevant corrected backpay amounts are set forth in GC Exh. 11. For S. Coons, the relevant corrected backpay amounts are set forth in GC Exh. 1(k).

⁵ While there is disagreement among the parties about the willingness or unwillingness of Respondent to produce this large volume of data, I find it neither necessary nor profitable to inquire into the discussions which resulted in the use of the stipulated data for the purposes of backpay calculations.

⁶ In its answer, Respondent contended that the wage rates used for 1995 were too high, but it presented no evidence at trial to support this contention, nor to provide any basis for calculating a more accurate wage rate. As there was no proof to support this contention, the contention is rejected and the wage rate for 1995 which was used in the compliance specification is found to be the most accurate estimate possible.

ment. Section 102.56(b) of the Board's Rules and Regulations requires that as to all matters within the knowledge of a respondent, including the various factors entering into the computation of gross backpay, a general denial will not suffice. If a respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures. It is undisputed that Respondent did not include its attrition argument in its answer, and did not produce supporting figures until the compliance trial. Indeed, Respondent could have retained its statistician far enough in advance of trial to have filed appropriate pleadings. I find that, under Section 102.56(b), Respondent is barred from asserting its attrition argument. *Power Equipment Co.*, 341 NLRB 249, 250 (2004); *Paolicelli*, 335 NLRB 881, 883 (2001). I find that the General Counsel was reasonable in choosing as comparable employees those who worked regularly, and I find that Respondent may not assert its "attrition" argument in opposition.

Even if Respondent were permitted to make the argument, it contradicts one of the basic tenets of Board law regarding the calculation of backpay. Here, the discriminatees have been shown to have worked regularly for more than 12 years. Therefore, employees such as those who would be included in the comparable group under Respondent's theory, who have gradually dropped out of the work force because of retirement, death, ill health, or other reasons, are simply not comparable employees to the discriminatees, who did not drop out of the work force for any reason. The three discriminatees continued to work in every quarter of the lengthy backpay period from the last quarter of 1990 through the end of the calculation. The hypothetical employees proffered by Respondent fail to meet the basic test of comparability. See, e.g., *Performance Friction Corp.*, above.⁷

I find that Respondent's witness, while an expert in statistics, was admittedly entirely ignorant with respect to the Board's methods and standards for calculating backpay. As his expertise was limited to the presentation of the statistical calculations he had done, the usefulness of his testimony was confined to the "attrition" theoretical construction and the "seasonal" hypothetical construction. His testimony was largely irrelevant to any other issues in this case, and his opinions, if any exist in the record, are not admissible as to any legal issues, which are to be decided by the Board.

⁷ In any case, it would be Respondent's burden to show that the discriminatees did in fact leave the work force for certain periods of time. *McGuire Plumbing & Heating*, above at fn. 1; *Wellstream Corp.*, 321 NLRB 455, 461 (1996). A hypothetical argument that a certain number of employees would leave the work force does not prove that these specific discriminatees left the work force. Respondent has stipulated that it did not contest the discriminatees' efforts to mitigate damages. In the face of the uncontested facts that the three discriminatees had earnings in every quarter from 1991 through the end of the calculated period, Respondent's argument based on hypotheses and averages is unavailing.

d. "Seasonality" issue

Respondent advanced at trial, again through its statistician witness, an argument that the gross backpay calculations should have been distributed among the quarters for each calendar year on a "seasonal" basis, rather than divided in fourths for each year. Respondent's basis for this argument is that the discriminatees' interim earnings were distributed among the relevant quarters according to their actual quarterly interim earnings, that they showed seasonal variation, and that the gross backpay should be similarly varied. Again, Respondent did not plead this defense until the trial. It neither included the seasonality argument in its answer, nor supplied supporting figures until the compliance trial. I find that Respondent is precluded by Section 102.56(b), from making the argument that the gross backpay should be unequally distributed among the quarters.

Even if I were to entertain this argument on its merits, I would find that it is inconsistent with Board policy. The General Counsel's method of dividing the annual hours into four equal quarters is the most accurate division possible under the circumstances. Distribution of the annual hours unequally into the backpay quarters according to a hypothetical scheme based on the discriminatees' interim earnings and their alleged "seasonality" would be a *less accurate* measure of gross backpay than the one used by the General Counsel. The object of Board policy is to find a reasonable and *reasonably accurate* measure of gross backpay. I find that Respondent's late-raised scheme does not comport with this policy. *F. W. Woolworth*, 90 NLRB 289 (1950).

I further find that Respondent is estopped from making the argument that the annual hours should be distributed unequally into the quarterly backpay periods according to a hypothetical scheme based on the seasonality of interim earnings. Respondent provided ONLY annualized data for backpay purposes. The provision of data reflecting only annual hours worked for the comparable employee group meant the General Counsel was unable accurately to calculate quarterly hours worked at Respondent reflecting differing numbers of hours for each quarter. Presented with ONLY an annual total of hours, the only reasonable way to assign the hours to particular quarters was to divide the total annual hours into four parts. The data, which would have permitted a more accurate quarterly assessment of hours worked by the comparable employee group in each quarter of the backpay period, was within Respondent's control. Respondent conceded at trial that it neither provided data embodying a quarterly breakdown of hours for the comparable employees nor did it urge the General Counsel prior to the compliance trial to assign the hours unequally to the quarters so as to reflect a hypothetical "seasonal" work year. Under these circumstances, Respondent cannot now argue for a hypothetical reconstruction of facts which it was within Respondent's power to provide, but which it did not provide.

B. Respondent's Burden of Proof

Respondent has the burden in a backpay proceeding of proving that it had effectively ended the backpay period by making valid offers of reinstatement to discriminatees. Such offers "must be specific, unequivocal, and unconditional." *Adscio Mfg. Corp.*, 322 NLRB 217, 218 (1996). See also *Cobb Me-*

chanical Contractors, above, 333 NLRB at 1173. Here, Respondent has proffered three letters, one addressed to each of the three discriminatees herein. The letters are all dated December 26, 1991, and are identical except for the names and addresses and one other word.⁸ According to the testimony of Jack West, director of human resources for craft employment in Respondent's human resources department, the letters existed in its business records. They were admitted as documents existing in the business records of Respondent. The Charging Party argues that they were erroneously admitted because the custodian of records, although subpoenaed by the Charging Party, did not appear to give testimony about these and other records. I find that the records were properly admitted as documents, which existed in the business records of Respondent.

The letters, however, are attached to express mail records showing the initials "M.S." There was no evidence proffered by Respondent to show whose initials appear on the receipts, and no witness was called by Respondent to testify to the letters having been mailed, nor to Respondent's business practice with regard to such mailings at the time the exhibits are dated. West was employed overseas for the years in question, and therefore had no knowledge of these facts. In addition, the handwritten notes purporting to come from J. Coons and S. Coons, which were attached to the offer letters were not authenticated by anyone familiar with the signatures contained in them. No explanation was offered by Respondent as to why such a witness was not called, nor why it did not subpoena the discriminatees themselves for this purpose. As the Charging Party argues, there is a lack of any evidence that the purported offers of employment were mailed to the discriminatees. I cannot find on this record that Respondent has carried its burden of proving that the purported offers of employment were ever actually mailed to the discriminatees.

Even assuming that Respondent could show that it had made the offers in question, they would not, under well-established Board law, operate to end the backpay periods. The letters refer to the three discriminatees as "applicants," thereby implying that they are not offers of jobs, but only a possibility of employment. The job offers are conditioned on the discrimina-

tees passing a drug test, a requirement that was undisputedly not in force at the BR jobsite where Bolen was employed and where the Coons brothers were unlawfully denied employment. The job offers are also conditioned on the taking of a welding test. As Bolen was already employed, this was clearly an additional condition on his offer. As to the Coons brothers, the Board's decision clearly found that the welding test was applied inconsistently at the BR jobsite, with some employees taking a retest, and some employees taking no test at all. The welding test is also a condition, which would not necessarily have obtained at the BR jobsite. Finally, the letter conditions acceptance of the purported job offer on the return of a postcard to Respondent "within a few days." Given that the letters were dated during the holiday period between Christmas and New Year's Day, such a requirement would have given the discriminatees only a very short time to respond to the job offer. The Board has held that such a short response time, as well as the conditional nature of the letters, render them invalid to end the backpay period. See, e.g., *Cassis Management Corp.*, 336 NLRB 961, 970 (2001); *American Tissue Corp.*, 336 NLRB 435, 447-448 (2001); *Performance Friction Corp.*, above, 335 NLRB at 1124-1125 fn. 35; *Cobb Mechanical Contractors*, above, 333 NLRB at 1173; *Halle Enterprises*, 330 NLRB 1157 (2000).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, Fluor Daniel, Inc., Greenville, South Carolina, its officers, agents, successors, and assigns, shall pay backpay to the employees named below the indicated amounts of net backpay and other reimbursable sums with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and less taxes required by law to be withheld:

John H. Coons	\$32,566.54
Stephen S. Coons	43,579.84
David Scott Bolen	18,442.05

IT IS FURTHER ORDERED that Respondent shall take the following affirmative action.

Offer immediate reinstatement to David Scott Bolen to his former position or, if that position no longer exists, to a substantially equivalent position, with the same seniority and benefits he would have enjoyed if he had been continuously employed by Respondent, and make him whole for all losses he suffered after the backpay period computed in the compliance specification, because Respondent has not made a valid offers of reinstatement to him.

Offer immediate instatement to John H. Coons and Stephen S. Coons to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, with the same seniority and benefits they would have enjoyed if they had been continuously employed by Respondent, and

⁸ The text of the letters to J. Coons and S. Coons is as follows:

Fluor Daniel extends to you a job offer of employment at the DuPont project, located on US Route 23 South, Circleville, Ohio, effective Monday January 6, 1992. You should report for work at 7:00 am on January 6. The work schedule consists of 40 hours per weeks. The position offered is that of pipewelder, with a pay rate of \$15.95 per hour.

As with all applicants at this project, pre-employment chemical screening is required. In addition, all non-certified applicants are required to pass a craft certification test, and if applicable, the required welder test (e.g. *TIG*, consisting of 2" schedule 80 carbon coupon, use 309 S.S. wire tack root and TIG all the way out; *STICK* consisting of Arkansas Bell Hole, 6010 Root and Pass 7018 filler and cap).

If you wish to accept this job offer you must complete and mail the enclosed card within the next few days. If you have any questions feel free to call me at the number on the enclosed card." The letter to Bolen was identical except that it stated in the first paragraph that the position offered was that of pipefitter.

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

make them whole for all losses they suffered after the backpay periods computed in the compliance specification, because Respondent has not made valid offers of reinstatement to them.

Respondent shall continue to be liable for backpay until such time as it makes a sufficient reinstatement offer to Bolen and sufficient instatement offers to J. Coons and S. Coons.